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No. 80-1452

In the Supreme Court

OF THE

United States

OCTOBER TERM, 1980

SAHARA TAHOE CORPORATION
Petitioner,

VS.

NATIONAL LABOR RELATIONS BOARD, and
HOTEL-MOTEL-RESTAURANT EMPLOYEES & BARTENDERS UNION,
LOCAL 86, HOTEL & RESTAURANT EMPLOYEES & BARTENDERS
INTERNATIONAL UNION, AFL-CIO,
Respondents

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Ninth Circuit

RESPONDENT UNION'S BRIEF IN OPPOSITION

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November 21, 1980

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QUESTIONS PRESENTED

Whether substantial evidence supports the Board's finding that petitioner had not established a reasonably grounded doubt of the union's majority status.

TABLE OF CONTENTS

	Page
Questions presented	i
Opinions below	1
Statement of the case	1
Argument	2
I	
The petition reiterates arguments already made to and denied by this court	2
II	
No conflict is created by the court's holding that petitioner failed to establish a reasonably grounded doubt of the union's majority status	3
A. The board and court adhered to the appropriate evidentiary standard	4
B. Petitioner's evidence was accurately assessed	6
Conclusion	8

TABLE OF AUTHORITIES CITED

Cases

Page

Automated Business Systems v. N.L.R.B., 497 F.2d 262 (6th Cir., 1974) 5

Barney's Club, Inc. and Sparks Nugget, Inc. d/b/a John Ascuaga's Nugget v. N.L.R.B., et al., 623 F.2d 571 (9th Cir., 1980) 2

Ingress-Plastene, Inc. v. N.L.R.B., 430 F.2d 542 (7th Cir., 1970) 5

J. Ray McDermott & Co., Inc. v. N.L.R.B., 571 F.2d 850 (5th Cir., 1978) cert. den. 439 U.S. 893 (1978)....3, 5, 7

Machinist Lodges 1746 and 143 v. N.L.R.B., 416 F.2d 809, (D.C. Cir., 1969) cert. denied 396 U.S. 1058 (1970) 5

N.L.R.B. v. Burns International Security Services, 406 U.S. 272 3,4

N.L.R.B. v. Cornell of California, 577 F.2d 513, 515-516 (9th Cir., 1978) 7

N.L.R.B v. King Radio Corp., 510 F.2d 1154 (10th Cir., 1975) cert. den. 423 U.S. 839 (1975) 5

N.L.R.B. v. Nevada Lodge, 584 F.2d 293 (9th Cir., 1978) cert. denied 442 U.S. 921, reh. denied 444 U.S. 887 (1979) 2, 4

N.L.R.B. v. Randle-Eastern Ambulance Services, Inc., 584 F.2d 720 (5th Cir., 1978) 5

N.L.R.B. v. Rogers I.G.A., Inc., 605 F.2d 1164 (10th Cir., 1979) 5

N.L.R.B. v. Tahoe Nugget, Inc., d/b/a Jim Kelley's Tahoe Nugget, 584 F.2d 293 .....2, 3, 4, 5, 6, 7

Orion Corp. v. N.L.R.B., 515 F.2d 81 (7th Cir., 1975).. 3, 5

Retired Persons Pharmacy v. N.L.R.B., 519 F.2d 486 (2nd Cir., 1975) 3, 5

Table of Authorities Cited

Cases

Page

Royal Typewriter Co. v. N.L.R.B., 533 F.2d 1030 (8th Cir., 1970) 5

Sahara-Tahoe Corporation v. N.L.R.B., 581 F.2d 767 (9th Cir., 1978), cert. denied 442 U.S. 917, reh. denied 444 U.S. 888 (1979) 2, 4, 5, 7

Silver Spur Casino v. N.L.R.B., et al., 623 F.2d 571 (9th Cir., 1980) 2

Terrell Machine Co. v. N.L.R.B., 427 F.2d 1088 (4th Cir., 1970) 3, 5

Universal Camera Corp. v. N.L.R.B., 340 U.S. 474 (1951) 6

Statute

29 U.S.C., § 159(c)(1)(a)(ii) 7

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OPINIONS BELOW

The opinion of the Court of Appeals (Pet. App. 1-7) has not yet been officially reported. The Decision and Order of the National Labor Relations Board is reported at 241 NLRB No. 12.

STATEMENT OF THE CASE

The Memorandum for the National Labor Relations Board in Opposition is an accurate and succinct statement of the case.

ARGUMENT

I

THE PETITION REITERATES ARGUMENTS ALREADY MADE TO AND DENIED BY THIS COURT

The Court should be familiar with the petition herein, as it repeats arguments already presented by petitioners in *N.L.R.B. v. Tahoe Nugget, Inc. d/b/a Jim Kelley's Tahoe Nugget* and *N.L.R.B. v. Nevada Lodge*, 584 F.2d 293 (9th Cir., 1978) *cert. denied* 442 U.S. 921, *reh. denied* 444 U.S. 887 (1979), *Sahara-Tahoe Corporation v. N.L.R.B.*, 581 F.2d 767 (9th Cir., 1978), *cert. denied* 442 U.S. 917, *reh. denied* 444 U.S. 888 (1979), and most recently, *Silver Spur Casino v. N.L.R.B., et al.*, 623 F.2d 571 (9th Cir., 1980), petition for certiorari pending, United States Supreme Court No. 80-660, and *Barney's Club, Inc. and Sparks Nugget, Inc. d/b/a John Ascuaga's Nugget v. N.L.R.B., et al.*, 623 F.2d 571 (9th Cir., 1980) petition for certiorari pending, United States Supreme Court No. 80-1083.

The Court's decisions to deny certiorari in the above cases should also apply here. The salient facts are virtually identical in all the cases. The "conflict" among the circuits which petitioner seeks to create has never existed. The Court below merely found that petitioner made an insufficient factual showing to establish a reasonable doubt of the Union's majority status, applying legal standards endorsed in other circuits and by this Court. (Pet. App. 2-3, 6-7). Petitioner's factual showing simply should not burden the Court's powers to review federal labor policy.

II

NO CONFLICT IS CREATED BY THE COURT'S HOLDING THAT PETITIONER FAILED TO ESTABLISH A REASONABLY GROUNDED DOUBT OF THE UNION'S MAJORITY STATUS

Petitioner's premise is that a conflict exists among the courts of appeals regarding the standards for justifying an employer's refusal to bargain with an incumbent union. (Pet. 11). In fact, the standards are clear, as petitioner admits in other portions of its petition. (Pet. 8). First, the Board and appellate courts have uniformly held that an employer which withdraws recognition from an incumbent union must overcome the presumption of continued majority status of the union by establishing that a majority of the employees in fact no longer desire to be represented by the union, or that the employer had a reasonably grounded doubt, entertained in good faith, of the union's majority status at the time of the refusal to bargain (Pet. 8, see also *Terrell Machine Co. v. N.L.R.B.*, 427 F.2d 1088 (4th Cir., 1970) and cases therein). This Court has recognized the validity of that presumption in *N.L.R.B. v. Burns International Security Services*, 406 U.S. 272, 279 n. 3. Second, the Board and courts uniformly require the presumption to be overcome by clear and convincing objective facts showing a reasonably grounded doubt of the union's majority status. *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 297; *Orion Corp. v. N.L.R.B.*, 515 F.2d 81, 85 (7th Cir., 1975); *Retired Persons Pharmacy v. N.L.R.B.*, 519 F.2d 486, 489-490 (2nd Cir., 1975); *J. Ray McDermott & Co., Inc. v. N.L.R.B.*, 571 F.2d 850, 858 (5th Cir., 1978) *cert. den.* 439 U.S. 893 (1978). Here, petitioner

sought to justify its refusal to bargain solely on the basis that it had a reasonable doubt of majority support for the Union at the time of the refusal to bargain. The court below correctly found the petitioner simply did not adduce any facts supporting a reasonable doubt.

Petitioner's real argument is with the objective standard it must meet to establish its reasonable doubt. Petitioner contends that ambiguous and equivocal evidence should be sufficient to support a "good faith" doubt, even if otherwise insufficient to show a reasonable and objective doubt. However, evidence of subjective good faith is not the test this Court has endorsed. *N.L.R.B. v. Burns International Security Services, supra,* 406 U.S. 272; *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 299-300; *Sahara Tahoe Corporation v. N.L.R.B., supra,* 581 F.2d 767.

In arguing that the court departed from standards applied in other circuits, petitioner takes the decision below out of context, and mischaracterizes decisions of other courts.

A. The Board and Court Adhered to the Appropriate Evidentiary Standard

No court of appeals permits an employer to base a refusal to bargain on ambiguous or equivocal evidence. Nor may the presumption be rebutted by presenting a shopping list of equivocal factors and claiming that the cumulative effect of the evidence was ignored. *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 304-305; *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 771-772. The requirement to produce unequivocal evidence as the factual predicate

for refusing to bargain has been variously phrased,[1] but the type of evidence deemed acceptable has not. In each case cited by petitioner in which the reasonable doubt defense was upheld, the employer established at least one factor which unequivocally indicated a decline in union support.[2] Conversely, the reported decisions manifest that employers' failures to rebut the presumption were attributable to ambiguous, speculative evidence. The quality of proof required to rebut the presumption is objective and equivocal and is not sustained by any showing of subjective good faith.

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[1]The quality of evidence required has been termed "clear, cogent and convincing." See *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 297; *Orion Corp. v. N.L.R.B., supra,* 515 F.2d 81, 85; *Retired Persons Pharmacy v. N.L.R.B., supra,* 519 F.2d 468, 489; or, "factors [which] point unequivocally to a decline in union support among petitioner's employees"; *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 771; *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 305; "objective evidence", *J. Ray McDermott v. N.L.R.B., supra,* 571 F.2d 850, 858; *Terrell Machine Co. v. N.L.R.B., supra,* 427 F.2d 1088, 1090; *N.L.R.B. v. Rogers I.G.A., Inc.,* 605 F.2d 1164, 1166 (10th Cir., 1979); or "rational basis in fact for doubts of majority status" *N.L.R.B. v. King Radio Corp.,* 510 F.2d 1154, 1156 (10th Cir., 1975) *cert. den.* 423 U.S. 839 (1975).

[2]See cases cited at Pet. 12-14. In *Ingress-Plastene, Inc. v. N.L.R.B.,* 430 F.2d 542 (7th Cir., 1970) the union president admitted he represented only 49 of the 155 employees in the unit. In *Royal Typewriter Co. v. N.L.R.B.,* 533 F.2d 1030 (8th Cir., 1970) and *Automated Business Systems v. N.L.R.B.,* 497 F.2d 262 (6th Cir., 1974) a valid decertification petition was filed, signed by more than 30% of the employees, in addition to other objective factors; In *Machinist Lodges 1746 and 143 v. N.L.R.B.,* 416 F.2d 809, (D.C. Cir., 1969) *cert. denied* 396 U.S. 1058 (1970) the union admitted to the employer that it lacked majority support in *N.L.R.B. v. Randle-Eastern Ambulance Services, Inc.,* 584 F.2d 720 (5th Cir., 1978) there was an admitted decrease in union supporters combined with other "solid evidence."

The Board and courts properly recognized that an exacting standard of proof insures that the focus of the good faith doubt defense is empirical and objective. By requiring that the employer be aware of and prepared to demonstrate facts manifesting a lack of union support, the Board and courts guarantee that an established bargaining relationship will not be disrupted based on the employer's subjective state of mind or speculative attitude. The policy reasons for that standard are equally well established. (*N.L.R.B. v. Tahoe Nugget, supra,* 584 F.2d 293, 301-302).

Petitioner has hardly unearthed a conflict among the courts of appeals. It cites no case in which subjective and speculative evidence was deemed sufficient to rebut the presumption of continued majority support. In essence, petitioner's argument amounts to a quibble regarding the weight of the evidence it presented, and the factual conclusions to be drawn therefrom. Such a dispute does not merit review by this Court. *Universal Camera Corp. v. N.L.R.B.,* 340 U.S. 474, 490-491 (1951).

B. Petitioner's Evidence was Accurately Assessed

The decision below followed the holdings of the Board and court in the other "casino cases" (Pet. App. 2), where employers consistently advanced the same evidence to justify their refusal to bargain with the Union,[3] and the Board and court found it to be equivocal, speculative and ambiguous. (Pet. App. 2, *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293). Indeed, the evidentiary showing was

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[3]Those "factors" included employee discontent with the Union, high employee turnover, low union membership, union financial difficulty, and a vigorous union membership drive. (Pet. App. 2).

compared to "the Cheshire cat's grin—nothing behind it." *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 772.

The only additional factor petitioner introduced to bolster its showing here was a "petition"[4] indicating that some employees no longer wanted to be *members* of the Union. But union membership is not equivalent to union support, particularly in a right-to-work state like Nevada. *Sahara Tahoe Corp. v. N.L.R.B., supra,* 581 F.2d 767, 772; *N.L.R.B. v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 305; *N.L.R.B. v. Cornell of California,* 577 F.2d 513, 515-516 (9th Cir., 1978); *J. Ray McDermott & Co. Inc. v. N.L.R.B., supra,* 571 F.2d 850, 859. Thus, petitioner offered the Board and court absolutely no reason to reach a result different from the other "casino cases."[5] As with those cases, certiorari should be denied here.

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[4]This "petition" was administratively determined by the Board not to be a valid decertification petition, pursuant to 29 U.S.C. § 159(c)(1)(a)(ii).

[5]Petitioner's contention that the Board and courts required "unequivocal proof" of the loss of union majority is hyperbole. (Pet. 10). Clearly the Board and court, is conforming with other circuits, required only some objective, unequivocal indication that majority support for the union did not exist (Pet. App. 7). Moreover, petitioner's evidence was considered on a cumulative basis, found deficient even on that basis. (Pet. App. 2-3), *NLRB v. Tahoe Nugget, Inc., supra,* 584 F.2d 293, 304-305, 308).

CONCLUSION

For all of the above reasons, as well as for the reasons stated in the Memorandum for the National Labor Relations Board in Opposition, the Petition for Writ of Certiorari should be denied.

Respectfully submitted,

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